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Supreme Court of the United States.

No. 273.—October Term, 1902.

THE UNITED STATES, Appellant, *vs.* HENRY C. TAYLOR, Rear Admiral United States Navy, Etc.	Appeal from the Supreme Court of the District of Columbia.

APPELLEE'S PETITION FOR A REHEARING.

Now comes the appellee and respectfully prays the court to restore the above-entitled cause to the docket and order a reargument thereof.

A rehearing of the cause is sought by the appellee upon this proposition: The Spanish cruiser, "*Infanta Maria Teresa*," having been captured on July 3, 1898, was thereafter taken for, or appropriated to the use of the Government, and her loss, which occurred subsequent to the appropriation, did not fall upon the captors, but must be borne by the United States, like that of a public vessel, or other public property.

JOS. K. McCAMMON,
GEORGE A. KING,
JOHN S. WEBB,
WM. B. KING,
JAMES H. HAYDEN,
Of Counsel for the Appellee.

CERTIFICATE OF COUNSEL.

The undersigned members of the bar of this Honorable Court believing that the foregoing petition possesses merit and warrants the granting of a rehearing of this cause, respectfully certify accordingly.

JOS. K. McCAMMON,
GEORGE A. KING,
JOHN S. WEBB,
WM. B. KING,
JAMES H. HAYDEN.

BRIEF IN SUPPORT OF THE APPELLEE'S PETITION FOR A REHEARING.

The Spanish Cruiser "Infanta Maria Teresa" was Captured and Made a Prize of War on July 3, 1898.

The decision of this court in the case of *United States* v. *George Dewey, Admiral, U. S. Navy, etc.* (*No.* 309, *October Term*, 1902), leaves no room for doubt that the "*Teresa*" was captured and made a prize of war in the battle of Santiago. On this point her's is a clearer case than that of the prizes taken in the battle of Manila Bay. Of the latter this court said (Opinion, p. 1):

> "Under the severe fire of the American fleet they steamed to a position of greater safety and, after the battle, backed ashore, and, when in shallow water, their sea-valves were opened and they settled on the bottom. They and other armed vessels were afterward set on fire by a detachment of the United States fleet, in obedience to a signal from the flagship when the firing ceased."

In the present case it appears that the "*Teresa*" was not sunk in the engagement or thereafter. Under the

severe fire of the American fleet she was *stranded*, and lay upon the beach in an upright position, and submerged no further than her normal load water-line. She was not sunk, but, in fact, was elevated by her contact with the beach. (*Report, Secretary of the Navy*, 1898 *Vol. II, p.* 578. *See diagram on page following* 572.)

Again, it appears that after the battle of Manila Bay, no effort was made by the American fleet to secure possession of the partially sunken Spanish ships. On the contrary Admiral Dewey ordered that they be set on fire and rendered unfit for immediate service, in case of hostile recapture. At Santiago, on the contrary, the *Teresa's* officers and men were made prisoners of war as soon as she surrendered. The captors did not then take formal possession of her and place a prize crew on board because of the more important business in hand, which the interests of the Government required them to perform. Nor was it in anywise necessary for the captors to go through the empty form of taking possession of the prize. She was already securely within their possession. Two days after the battle the Chief of Staff and other captors visited the *Teresa*. The delay of two days was not in the least significant, and does not tend to show that they had abandoned her. (*U. S.* v. *Dewey supra*). Their first duty was to see to the repair of their own vessels and resume the blockade of Santiago. At the first opportunity (*July* 6,) without any suggestion from the Navy Department, Admiral Sampson appointed a board to examine and report upon the condition of the Spanish vessels. His purpose was to ascertain (1) whether any of them could be sent in for adjudication, pursuant to the statute (*R. S. U. S. Sec.* 4615); (2) whether any of them were salvable, by the means at the captor's command or which might be procured from the United States; and (3)

whether any of them "not being in condition to be sent in for adjudication" should be surveyed and appraised and sold in the manner prescribed by the statute (*R. S. U. S.* 4615, *last clause*). This board commenced its work on July 7th, and completed it prior to July 13th, when its report was presented to the commander-in-chief. This report showed (1) the *Teresa* was a salvable ship, having received only local injury; (2) her recovery was recommended; and (3) it was further recommended that she be secured in her position by hawsers, to save her from possible further damage. To be sure the superstructure of the vessel, with the exception of her turrets and the upper portions of her armor, had been damaged by fire and was of no great value, but the hull proper or the portion of the ship extending from the protective deck, downward to her keel, was practically intact. Not only is the hull proper the more costly portion of a vessel, but it is the portion upon which she depends for her structural strength, stability, and buoyancy. Furthermore, it contains the main engines and boilers, and the greater part of the ship's machinery. An investigation made by the Navy Department in the latter part of July, disclosed the fact that one of the *Teresa's* bottom plates had been perforated and cracked by her impact with the beach when run ashore during the battle, but that was a local and unimportant injury. It did not in anywise affect the structural integrity or strength of the vessel, and was something capable of being easily and completely repaired. She was successfully salved and made a voyage to the port of Guantanamo, then occupied by the United States as a base for naval operations on the southern coast of Cuba.

The inevitable conclusion is that the *Teresa* was not destroyed in the engagement and not damaged to an ex-

tent greater than, if as great as, the *prizes* taken at Manila Bay. She was captured and made a prize on July 3, 1898. This fact does not depend upon anything done to her by the captors or by the Navy Department after the battle. Subsequent events could neither give, nor deprive her of her status as a prize.

In this case, as in the Dewey case, the captors made reports to the Navy Department by cable and by letter. In some of them the *Teresa* and the prizes taken at Manila Bay were spoken of as *destroyed*. Such loose expressions can have no significance. (*U. S.* v. *Dewey supra, p.* 7).

After being Captured, the "Teresa" was Taken for or Appropriated to the Use of the Government, and Her Subsequent Loss, which Occurred on or about November 1, 1898, *did not Fall upon the Captors, but Must be Borne by the United States, like that of Any Public Vessel or other Public Property.*

At the hearing of this case the above proposition was merely stated. It was not fully considered either in the appellee's brief or the argument, because it had been conceded by the Attorney General that the "*Teresa*" was appropriated for the use of the Government and that her subsequent loss did not affect the rights of the captors.

In the brief for the United States we find this (*pp.* 33-34):

> "*It is not contended on the part of the United States that either the appropriation of the "Teresa" by the United States, when the wreck was finally raised and sent to Guantanamo for preliminary repairs, or the subsequent abandonment of the vessel at*

*sea and her final destruction on Cat Island have divested the appellee of any rights whatever. Had the "Teresa" been a prize the appellee's rights as captor would not have been changed by the appropriation, and after appropriation it would have made no difference to the appellee whether the vessel was lost or not, as he was not responsible for what became of her. * * * Furthermore, being so 'sunk or otherwise destroyed' she could not be a prize for the benefit of the captors, but was the property of the United States jure republicæ, just as much so as if she had been captured by a joint naval and military force. The appropriation was by the right of the United States as sovereign and not under section 4624 of the Revised Statutes. The appellee is entitled to bounty for the destruction of the 'Teresa,' but to nothing more."*

The opinion of this court in the Dewey case shows that counsel for the United States were wrong in saying that the "*Teresa*" was not captured and made a prize. But the position taken by them with respect to the appropriation of the vessel by the Government and her subsequent loss is correct, being in accord with the facts and consistent with the conduct of the Secretary of the Navy and other naval authorities.

In the report of the Navy Department for the year 1898 (*Vol. I,* p.* 16), the Secretary said:

> "The Department, immediately after the battle of Santiago, had an examination of the Spanish wrecks made, and entered into a contract with the Merritt

* We fear that the first volume of this report, a public executive document, put in evidence in the prize court, and admissible as evidence on appeal, was not furnished to or considered by this court, after the argument of the case. Counsel for the United States absolutely refused to print the record in the usual way, but agreed to provide the court with copies of all reports referred to. If this were not done, counsel for the captors cannot be held answerable for the omission.

& Chapman Wrecking Company to raise these ships. *The Maria Teresa was successfully raised* and an effort was made by the contractors to bring her to the Norfolk Navy Yard, as under their contract vessels raised were to be delivered at that port. * * * On November 1 she encountered heavy weather off the Island of San Salvador and was on that night abandoned. * * * A court of inquiry into this matter has been ordered."

The Assistant Secretary said (*Id. pp.* 100-103):

"I think it was the day following the battle of July 3, when the reports had come to the Department of the condition of the wrecks of the ships of Cervera's fleet, that you suggested the prudence of attempting to save such of them as seemed worth the effort.

"Negotiations were at once opened by telegraph with the Merritt & Chapman Wrecking Company. Representatives of that concern came to Washington and were met in this office, where the subject of the inquiry was fully talked over, and an agreement entered into between the Department and the Company by which the latter were to proceed at once to the scene of operations with a full and suitable outfit to commence operations at once, and to continue them diligently until a successful result was reached, or until the contracts were terminatad by the order of the Department.

* * * * * *

"They (wrecking company) then proceeded at once to the *Maria Teresa*, as presenting a wrecking problem which promised satisfactory results. * * *

"In the meantime the progress of the wreckers had not been entirely satisfactory to the Department so far as results showed, and the entire wrecking operations were placed under the immediate charge of Commodore Watson, then in command of that station. Through him regular weekly reports were made as to the progress of the work. * * *

"From that time, by direction of the Department, wrecking operations were centered on the *Teresa*."

The contract with the wrecking company, to which the Secretary and Assistant Secretary of the Navy refer in their reports (*supra*) was made by the Secretary in the name and on behalf of the United States (*p.* 15). It shows that the United States considered the captured property its own. The rights of the captors were not recognized in any way. *The United States was not acting as a salvor.* It shows that the Government had no intention of sending in the vessel for adjudication as provided by the statute. (*R. S. U. S. Sec.* 4615.) She was not to be delivered to a prize court, but to the commanding officer of the Norfolk Navy Yard. She was not to "be sent in for adjudication to the nearest home port in which a prize court might be sitting," in accordance with article 20 of the "Instructions to Blockading Vessels and Cruisers." (*General Order June* 20, 1898.)

The contract was made three days after the battle, *without the knowledge or consent of the captors,* and before they had an opportunity to ascertain the condition of the Spanish ships and see whether any of them could be sent in for adjudication, and if "not in condition to be sent in" to survey and appraise them, to the end that they might be sold in accordance with the last clause of Section 4615, Revised Statutes.

The report of the Navy Department for the year 1898 (*supra*) contains a "*Report of the Chief of the Bureau of Construction and Repair,*" dated September 24, 1898, or five weeks before the *Teresa* was lost (*p.* 511). This was an official document and furthermore was adopted by the Secretary, when he accepted and incorporated it in his official report for the year, the latter being dated Novem-

ber 15, 1898, fourteen days after the *Teresa* was abandoned at sea and after her loss was reported to the Department. It contains a table, entitled "*Table of Vessels of the United States Navy*" (*p.* 526, *et seq.*), made up of the names and descriptions of various vessels. These are grouped in classes, such as: "*First-class battleships*," "*Second-class battleships*," "*Armored cruisers*," "*Double turreted monitors*," "*Harbor defense monitors*," "*Protected cruisers*," "*Gunboats*," "*Torpedo-boat destroyers*," "*Torpedo-boats*," "*Iron and wooden steam vessels*," etc.; also a class entitled "CAPTURED IN SPANISH-AMERICAN WAR" (*pp.* 570-573). We reproduce the list last mentioned for it furnishes conclusive proof that the *Teresa* had been appropriated by the Government and was its property on or before September 24, 1898.

CAPTURED IN SPANISH-AMERICAN WAR.

Name.	Type.	Rig.	By whom and where built.	Condition or service.	Length.	Extreme breadth.	Mean draft.	Displacement.	Gross tonnage.	Net tonnage.	Propulsion.	Speed in knots per hour.	Maximum indicated horse-power.	Tons per inch immersion at normal draft.	Normal coal supply.	Bunker capacity.	Maximum draft aft at lowest point of keel. Ship ready for sea, bunkers full.
					Ft. In.	*Ft. In.*	*Ft. In.*	*Tons.*	*Tons.*	*Tons*				*Tons*	*Tons.*	*Tons.*	*Ft. In*
Alvarado	Steel gunboat	2 pole masts.	Clydebank, England.	North Atlantic Fleet.	109 5	15 5	4 11	100	.....	.....	Single screw.	19	137	.....	.....	11	.....
Barcelo	Torpedo-boat	.....	Normand, Havre, France.	Asiatic Station.	124 7	11 0	6 11	66	.....	.....	Single screw.	17	600	.....	.....	19	.....
Callao	Steel gunboat	Schooner	Cañacan	Asiatic Station.	119 1	17 7	6 8	208	.....	.....	Twin screw.	9.7	250	.....	.....	32½	.....
INFANTA MARIA TERESA.	STEEL ARMORED CRUISER.	2 MIL. MASTS.	BILBAO	BEING REPAIRED.	338 2	65 0	21 6	7,000	.....	.....	TWIN SCREW.	20½	13,700	.....	.....	1,050	.....
Leyte	Iron gunboat	.....	Whampoa, Hongkong.	Asiatic Station.	98 5	16 6	7 3	151	.....	.....	Twin screw.	8	150	.....	.....	25	.....
Manila	Iron transport	.....	Leith	Asiatic Station.	226 2	29 10	13 3	1,900	.....	.....	Single screw.	9	750	.....	.....	204	.....
Mindanao	Wooden gunboat.	.....	Cartagena	Asiatic Station.	92 2	17 10	5 6	83	.....	.....	Twin screw.	8	110	.....	.....	18	.....
Sandoval	Steel gunboat	2 pole masts.	Clydebank, England.	North Atlantic Fleet.	109 5	15 5	4 11	100	.....	.....	Single screw.	19	137	.....	.....	11	.....

Name.	Batteries.	Torpedo tubes.	Armor.			Protective deck.		Complement.	Keel laid.	Launched.	Date of capture.	Date of first commission in U.S. Navy.
			Sides.	Turrets.	Barbettes.	Slopes.	Flat.					
			Inches.	*In.*	*In.*	*In.*	*In.*					
Alvarado	1 57mm 1 37mm	...	.....	.....	.....	.....	.....	33	.....	1895	.....	.....
Barcelo	2 mach., 25mm	2	.....	.....	.....	.....	.....	18	.....	1886	.....	Aug. 13, 1898
Callao	1 Hontoria, 3″ 5 1 Hontoria, 2″.75	...	.....	.....	.....	.....	.....	35	.....	1888	.....	July 2, 1898
INFANTA MARIA TERESA.	2 Nordenfelt, 11mm 2 11″ Hontoria 10 5″.5 Hontoria 8 57mm Hotchkiss 8 37mm Hotchkiss 2 11mm Nordenfelt 2 2″.75 bronze.	8	10 *to* 12	9.8	.....	.....	2	497	.....	1890	.....	.....
Leyte	1 Hontoria, 3″.5 1 Hontoria, 2″.75	...	.....	.....	.....	.....	.....	35	.....	1887	.....	.....
Manila	2 Nordenfelt, 11mm 2 bronze guns	.....	.....	.....	.....	.....	.....	77	.....	1883	.....	July 20, 1898
Mindanao	1 bronze rifle, 4″.8 1 mach., 11mm	...	.....	.....	.....	.....	.....	35	.....	1871	.....	.....
Sandoval	1 57mm 1 37mm	...	.....	.....	.....	.....	.....	33	.....	1895	.....	.....

Again, in the same report, we have this list (pp. 588-589):

SUMMARY SHOWING THE NUMBER OF VESSELS IN THE UNITED STATES NAVY.

Regular Navy.

First-class battleships	12
Second-class battleship	1
Armored cruisers	2
Armored ram	1
Double-turreted monitors	6
Steel single-turret monitors	4
Iron single-turret monitors	13
Protected cruisers	13
Protected cruisers sheathed with wood	2
Gunboats	9
Light-draft gunboats	3
Composite gunboats	6
Training ship (Naval Academy)	1
Special class	2
Torpedo-boat destroyers	16
Steel torpedo-boats	35
Submarine torpedo-boat	1
Wood torpedo-boat	1
Captured in Spanish-American War	8
Iron cruising vessels	5
Wooden cruising vessels	8
Sailing vessels	6
Tugs	14
Wooden steam vessels unfit for sea service	11
Wooden sailing vessels unfit for sea service	6
Total number of vessels in regular Navy	189

Auxiliary Navy.

Merchant vessels converted into auxiliary cruisers	11
Converted yachts	28
Converted tugs	27
Steamers converted into colliers	19
Special class	17
Revenue cutters	15
Light-house tenders	4
United States fish commission	2
Total number of vessels in auxiliary Navy	123
Grand total	312

The *Teresa* was one of the eight vessels "CAPTURED IN SPANISH-AMERICAN WAR," and was one of the 189 "VESSELS IN REGULAR NAVY." We submit that on the date of this report the *Teresa* was public property, in no less a sense than were the *Oregon*, the *Indiana*, the *Iowa*, the *New York*, and the *Brooklyn*. The appropriation of the ship had become a transaction as complete as the Department could make it. The Department had done more than signify its election to take the ship. It had taken her for its use and dealt with her accordingly.

On November 17, 1898, after the loss of the vessel, the Secretary ordered a naval court to inquire into "The circumstances connected with the abandonment of the steamer *Infanta Maria Teresa*, late of the Spanish Navy, at sea, about 310 miles distant from Caimanera, Cuba." The order convening the court (*p.* 9) contained this:

> "The attention of the court is called to the instructions containing particulars to be investigated concerning the loss or the grounding of a ship of the Navy, contained in the U. S. Navy Regulations (Articles 1744 to 1747), which the Department deems applicable to the case."

The articles to which the Secretary refers appear in the new edition of the Navy Regulations (1900) as Articles 1806 and 1807, under the title: "*Inquiry into the loss or grounding of a ship of the Navy.*"

The regulations do not provide for the appointment of a court of inquiry to investigate the loss of a prize. *Such a matter would fall within the exclusive jurisdiction of the district courts of the United States.* (*Notes on the Principles and Practice in Prize, Story, p.* 29.) Neither do they authorize the ordering of such a court unless a vessel of or persons in the Navy are concerned in the subject of the inquiry.

We fear that in some way the court has been led to suppose that the captors had some part in the floating and repair of the prize. *Such was not the case.* About July 19th, the wrecking company took possession of the vessel and other captured property, which up to that time had been under the care of the captors. The captors took no part in the subsequent operations, nor were they consulted with regard to them. On August 12th Admiral Sampson and his command were ordered home. The fleet left Cuban waters and proceeded to New York. Thereafter, neither the admiral, as the commander-in-chief, nor any other representative of the captors, had any connection, official or otherwise, with the floating or the repair of the *Teresa.* The work was done by the wrecking company, assisted by a naval force. An officer of the Navy, delegated to act as the Department's representative, was always present at the scene of operations. The officer in command of a naval force, which had its headquarters or base at Guantanamo had supervisory charge of the work, and from time to time made reports to the Department concerning its progress or lack of progress. He was not one of the captors, and did not assume to represent

them. (*Report Sec. of Navy, Vol.* I, *pp.* 100–103.) The *Teresa* sailed from Guantanamo for Norfolk when the Department's representative considered that she had been put in a seaworthy condition. Her course was planned by the Department's representative (*pp.* 93–94). On her way she was navigated, in part by naval officers representing the Department, and in part by the wrecking company, which also represented it. The captors were not represented. Their interest in the vessel, herself, had ceased, through her appropriation by the United States. But their legal right to share in a sum equal to her value remained, being preserved by sections 4624 and 4625 Revised Statutes.

But for the interference of the United States, the captors could have sold the stranded vessel and the property on board of her, realizing a fund which would have been sent to the prize court at Key West, where it would have taken the place of the vessel herself, and after adjudication, been distributed like other prize money. (*R. S. U. S., Sec.* 4615, *last clause.*)

Now let us turn to the statute which governs this question. It is provided (§ 4624, *R. S. U. S.*):

> "*Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisement and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward* sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. *In all cases of prize property taken for or appropriated to the use of the Government, the Department for whose use it is taken*

or appropriated shall deposit the value thereof with the Assistant Treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause."

The attention of the court is called, especially, to these expressions contained in this statute:

"Whenever any captured vessel * * * or other material *are taken for the use of the United States.* * * *"

"In all cases of prize property *taken for or appropriated to the use of the Government.* * * *"

This means that it is the duty of the Government to make the survey, appraisal, and deposit required by law *when a prize* IS *taken by the Government, from the captors, with a view to her use by the Government,* IN THE FUTURE. *There must be, not only an election to appropriate, but the appropriation must be a completed transaction.* The law does not permit the Government to divert the prize from one of the two regular methods of disposition; *i. e.*, adjudication *in rem*, or sale and adjudication of the proceeds—and then say to the captors that it does not like its bargain and they can have the prize for adjudication if they can find and send her in. Without doing violence to the statute it cannot be held that the Government can make an actual appropriation of a prize, yet make the legal effect of the appropriation conditional upon the Government's deriving benefit from her use.

A parallel case would be one where a vessel had been built for the Government, under contract, and delivered to and accepted by it. There, although the vessel were lost before she had performed any service and before payment had been made, the Government would be bound to pay for her. Thus, from the moment when a prize passes from the ownership of the captors to that of the United

States through appropriation, all risks attendant upon the ownership of the vessel devolve upon the Government. The captors have no title or interest in the vessel herself, and consequently no risks and responsibilities with respect to her. From that moment the Government is bound to replace the ship, by a deposit, equal to her value, when taken.

In its opinion, the court notices the fact that the *Teresa* was not surveyed, appraised, and sold, as prize property, not in condition to be sent in for adjudication. It should be remembered that the Secretary of the Navy by his contract with the wrecking company, elected to appropriate the vessel on July 6, 1898, before the captors had completed their preliminary survey and had an opportunity to appraise and sell her. The statute (*R. S. U. S. Sec.* 4615) provides that prize property shall *not* be sold by the captors, when the Government has appropriated it. It is true that the Secretary of the Navy neglected to order an appraisal of the *Teresa* until July 13, 1899, or shortly before this suit was brought. The Secretary was of the opinion that for some reason the *Teresa* and the Spanish ships taken at Manila Bay were not captured as prize and that the United States "*jure reipublicæ*" could take and dispose of them as it pleased, without accountability to any one. In the Dewey case it has been held that the Secretary was wrong. Surely his error on a question of law cannot tend to deprive the captors of their rights.

The captors' delay in filing their libel cannot militate against them. It was filed on the day after that in the Dewey case.

To sum up. We contend that before her loss, the "*Teresa*" had been appropriated by the United States and should be condemned as prize, because:

(1) The Secretary of the Navy exercised absolute con-

trol over her in contracting to have her floated and brought to Norfolk.

(2) The Secretary, by his report for the year 1898, recognized that the "*Teresa*" had been appropriated by the Government, and was, when lost, one of the vessels of the regular Navy.

(3) The Secretary of the Navy recognized that the "*Teresa*" was a vessel of the Navy, by directing a court of inquiry, appointed *after* her loss, to proceed in accordance with the regulations governing "*An inquiry into the loss or grounding of a ship of the Navy.*"

(4) Counsel for the United States admitted that the "*Teresa*" had been appropriated by the United States and her loss did not affect the captor's rights.

We submit that, in the official report of the Secretary of the Navy and in the brief for the United States, we have admissions by the Executive branch of the Government, that the "*Teresa*" had been appropriated for the use of the Government, and that the judiciary should not deny to these acts of executive officers their full legal effect.

We submit that a case of such importance as this, affecting as it does the interests of all the officers and men who won for the United States the greatest naval battle of modern times, should not be dismissed and the captors denied a full reward for their bravery, without a thorough hearing upon and consideration of the foregoing facts.

Respectfully submitted.

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